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Supreme Court, U.S.
FILED
SEP 22 1995
CLERK

No. 94-924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES ARTHUR "ART" POPE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees,

and

RALPH GINGLES, *et al.*,
Appellees.

Appeal from the United States District Court
Eastern District of North Carolina,
Raleigh Division

BRIEF OF APPELLANTS POPE, ET AL. ON THE MERITS

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September 22, 1995

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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QUESTIONS PRESENTED

I

Did the district court err in failing to shift the burden of persuasion to the State to prove that the racially gerrymandered districts in its congressional redistricting statute were justified by a compelling state interest and were narrowly tailored to address that interest?

II

Did the district court err in concluding in this case that Section 5 of the Voting Rights Act was a compelling state interest justifying North Carolina's congressional redistricting statute?

III

Did the district court err in finding that the North Carolina General Assembly actually or properly relied on Section 2 of the Voting Rights Act as a compelling state interest justifying North Carolina's congressional redistricting statute?

IV

Did the district court err in concluding that North Carolina's congressional redistricting statute was narrowly tailored to further a compelling state interest by the least restrictive means practically available?

THE PARTIES

JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY MCBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE and JACK HAWKE, individually, are appellants in this case and were plaintiff-intervenors below;

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK, are appellants in *Shaw v. Hunt*, filed concurrently with this appeal, and were plaintiffs below;

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS A. WICKER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate, DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives, RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina, EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections, JEAN H. NELSON, in her official capacity as a member of the North Carolina State Board of Elections, LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections, DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections, are the appellees in this case and were defendants below;

RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N.A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID

MOORE, ROBERT L. DAVIS, C.R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER MCGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPEY, WOODY CONNETTE, ROBERTA WADDLE and WILLIAM M. HODGES, are appellees in this case and were defendant-intervenors below.

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BRIEF OF APPELLANTS POPE, ET AL., ON THE MERITS

OPINION BELOW

The district court's amended opinion was officially reported at 861 F. Supp. 408 (E.D.N.C. 1994), and is in the Appendix to the Jurisdictional Statements (hereinafter "App. J.S.") at 6a to 154a.

JURISDICTION

On August 1, 1994, the three-judge district court entered its judgment. Chief Judge Voorhees dissented. App. J.S. at 4a. On August 15, 1994, plaintiffs filed a motion to amend and add findings. On August 18, 1994, plaintiff-intervenors filed a notice of appeal. App. J.S. at 161a. On August 22, 1994, the district court issued a substantially amended opinion. App. J.S. at 6a. Plaintiffs filed a notice of appeal on August 29, 1994, and plaintiff-intervenors filed a supplemental notice of appeal. App. J.S. at 157a, 163a. On September 1, 1994, the district court denied the plaintiffs' motion to amend and add findings. Chief Judge Voorhees dissented. App. J.S. at 155a. Plaintiff and plaintiff-intervenors each then filed a supplemental notice of appeal. App. J.S. at 159a, 165a. The Court noted probable jurisdiction on June 29, 1995. 115 S. Ct. 2639 (1995). This Court has jurisdiction pursuant to 28 U.S.C. § 1253 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal statutory and constitutional provisions involved in this case are:

(a) Section 1 of the fourteenth amendment to the Constitution of the United States which provides, in pertinent part: No State shall "deny to any person within its jurisdiction the equal protection of the laws;" and

(b) Section 2 and Section 5 of the Voting Rights Act of 1965, as amended. 42 U.S.C. §§ 1973, 1973c (1988). The text of these statutes is set forth in the Appendix to this Brief.

(c) Chapter 7 (1991) (Extra Session) (hereinafter "Chapter 7"), the challenged congressional redistricting statute involved, which amends North Carolina Elections Code Chapter 163, article 17. The text of Chapter 7 is set forth in the Appendix to the Jurisdictional Statements. App. J.S. at 169a.

STATEMENT OF THE CASE

A. Proceedings Below

The district court originally dismissed the plaintiffs' claims that Chapter 7 violated the Equal Protection Clause. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992). In *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816 (1993), this Court reversed and held that the plaintiffs had stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly had adopted a redistricting plan that was "so irrational on its face that it can be understood only as an effort to segregate voters into voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at 2832.

On remand, the district court permitted appellants herein -- eleven persons registered to vote as Republicans in North Carolina -- to intervene as permissive intervenors under Fed. R. Civ. P. 24(b) ("plaintiff-intervenors") on the condition that they

adopt, as their own, the amended complaint filed by the original plaintiffs. J.A. 13.

In its Answer, the State denied that the redistricting plan was a "racial gerrymander" subject to strict scrutiny. Alternatively, the State argued that even if subject to strict scrutiny, the redistricting statute was "narrowly tailored" to achieve the following compelling state interests: obtaining preclearance under Section 5 of the Voting Rights Act, avoiding a violation of Section 2 of the Voting Rights Act, and eradicating the effects of past racial discrimination.[1]

A trial was held from March 28, 1994 through April 4, 1994. On August 1, 1994 (as amended on August 22, 1994), all three judges found that the First and Twelfth Districts resulted from a racial gerrymander and therefore subjected North Carolina's redistricting statute to strict scrutiny. *See Shaw*, 861 F. Supp. at 473-74, 476. The majority held, however, that the plaintiffs and plaintiff-intervenors failed to carry "their burden of proving that the justification the state has advanced for the challenged Plan's use of race is untenable, either because the interest identified was not a 'compelling' one or because the means used were not 'narrowly tailored' to its achievement." *Id.* at 475. In reaching this conclusion, the majority relied upon North Carolina's alleged desire to comply with Section 2 and Section 5 of the Voting Rights Act as a compelling state interest.

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[1]Notably, during oral argument in *Shaw v. Reno*, the State's counsel conceded that the two districts were racially gerrymandered, but justified the State's conduct by relying solely on Section 5 of the Voting Rights Act. *See Shaw v. Reno*, No. 92-357, 1993 WL 751836, at 26-27, 29-30, 38-43 (U.S. Oral Arg. Apr. 20, 1993). North Carolina adopted these additional alleged justifications on remand.

B. Statement of Facts

Before the 1990 census, North Carolina had a total of eleven congressional districts. As a result of the 1990 census, North Carolina became entitled to an additional congressional district. In early 1991, the North Carolina General Assembly began the redistricting process. *Shaw*, 861 F. Supp. at 417.

The North Carolina General Assembly consists of a 50-member Senate and a 120-member House of Representatives. J.A. 43-44. In March 1991, the Democratic party controlled both the House and the Senate. The Senate established a Redistricting Committee, with separate subcommittees for legislative redistricting and congressional redistricting. J.A. 46. Democratic Senator Dennis J. Winner was Chairman of the Senate Redistricting Committee. *See id.; Shaw*, 861 F. Supp. at 458.

In March 1991, the House established two separate redistricting committees, one of which was responsible for congressional redistricting. Speaker Daniel T. Blue, Jr., an African American, selected the members of these committees. One of the Co-Chairmen of the House Congressional Redistricting Committee was Representative Milton F. "Toby" Fitch, Jr., an African American. J.A. 46-47. Representatives Blue and Fitch were both members of the Democratic party. *See id.; Shaw*, 861 F. Supp. at 458.

Early in the 1991 redistricting process, a private meeting was held between the Democratic chairmen of the redistricting committees to discuss whether North Carolina would have any majority-African-American congressional districts. During this meeting, several senators stated that they had discussed congressional redistricting with the incumbent North Carolina congressmen and were of the opinion that there would be no

majority-African-American congressional districts. Representative Fitch disagreed and stated that there should be two majority-African-American districts because two out of twelve congressional seats would be roughly proportional to the percentage of African Americans in North Carolina's general population. As a result of this discussion, the chairmen agreed that there would be one majority-African-American congressional district. *See* J.A. 402-03; *see also Shaw*, 861 F. Supp. at 460.

During the 1991-1992 redistricting cycle, Gerry Cohen was the Director of Bill Drafting for the Legislative Services Commission, chaired by Speaker Blue. Cohen was responsible for drafting congressional and legislative redistricting proposals and for coordinating the preparation of the material that North Carolina would submit to the United States Department of Justice pursuant to Section 5 of the Voting Rights Act. *See Shaw*, 861 F. Supp. at 458 & n.53; Trial Tr. ("T.T.") pp. 307-08, 311-12. In performing his duties, Cohen was directed to follow the instructions of only certain designated members of the Democratic "legislative leadership" in the General Assembly, including Speaker Blue, Senator Winner, and Representative Fitch (hereinafter "Democratic leadership"). *See Shaw*, 861 F. Supp. at 458; J.A. 349-50.

Consistent with the "compromise" made by the chairs of the redistricting committees, the Democratic leadership told Cohen to draw a majority-African-American district in any congressional plan to be considered. Cohen's instructions concerning the majority-African-American district were to "**keep the district such that a black would be elected, which I did.**" J.A. 92 (emphasis added); T.T. pp. 448-49.

On April 17, 1991, the House and Senate Congressional Redistricting Committees met jointly and adopted the following

criteria to guide the committees in developing congressional districts: (1) equal population in districts; (2) compliance with the Voting Rights Act and the Fourteenth and Fifteenth Amendments; (3) single member districts consisting of contiguous territory; (4) retain the integrity of precincts; and (5) not divide census blocks. *Shaw*, 861 F. Supp. at 460; J.A. at 49-50.[2]

The General Assembly used a redistricting computer software program in preparing and analyzing redistricting plans. J.A. 47. One type of information loaded in the redistricting computer was geographic information and political boundaries. J.A. 47. Also included was census data at the census block level on total population and voting age population and voting age population by race or national origin and on housing density. In addition, the tapes also provided this data at the precinct level for 48 counties. The General Assembly staff added precinct level data for 21 additional counties. J.A. 47. The staff also added voter registration data by race and party as of November 1990. J.A. 47.[3]

Before enacting its first congressional redistricting plan, the General Assembly rejected several plans proposed by Republican Representative David Balmer. One of Representative Balmer's plans, which was called "Balmer

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[2]Neither the General Assembly nor either redistricting committee ever adopted a criteria related to compactness, functional compactness, political compactness, geographic compactness, homogeneity, distinctiveness, community of interest, the desirability of either an urban or rural district, incumbency protection, or party affiliation. *See* Stipulation ("Stip.") 43; J.A. 514-20; J.A. 391-92; J.A. 258; T.T. pp. 428-39, 467-524.

[3]The redistricting computer database did not contain any demographic information concerning income, education, type of employment, health care data, commuter patterns, or any other type of economic, sociologic, or historical data. *See* J.A. 48.

Congress 6.2," contained a majority-African-American district in northeastern North Carolina and a "majority-minority" district running from Charlotte to Wilmington. In this latter district, Representative Balmer combined African Americans in south central North Carolina with Native Americans in southeast North Carolina to form a "majority-minority" district. *See Shaw*, 861 F. Supp. at 460-61; J.A. 51; Stips. 2, 3; Ex. 10, pp. 27-37. Representative H.M. Michaux, Jr., an African American Democratic Vice Chairman of the House Redistricting Committee, accused Representative Balmer of attempting to minimize the influence of African Americans by "stack[ing]" them into two districts. Ex. 200, pp. 1005, 1163-64. Other Democratic legislators criticized Representative Balmer's plan as lacking in geographic compactness. *See* Ex. 200, pp. 1004-06; T.T. pp. 457-59.

In July 1991, the North Carolina General Assembly enacted 1991 N.C. Session Laws, Ch. 601 ("Chapter 601"), which included one majority-African-American district. This majority-African-American district was located in northeastern North Carolina and extended west to include concentrations of African Americans in Durham. *See Shaw*, 861 F. Supp. at 461; J.A. 53-54. Representative Fitch stated publicly that Chapter 601 was "fair, legal, and reasonably compact given the geography of the State." J.A. 429-30.

On September 28, 1991, North Carolina sent its congressional redistricting plan to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act. Cohen was responsible for reviewing and coordinating the preparation of North Carolina's submission. *See* J.A. 54-55, 350-52.

On October 14, 1991, Cohen submitted to the Department of Justice a memorandum on behalf of

Representative Fitch, Senator Winner, and Speaker Blue in support of obtaining preclearance for Chapter 601. J.A. 94-95. The memorandum provided a detailed response to criticisms of Chapter 601 by the ACLU and other groups who supported the creation of a second majority-African-American congressional district. J.A. 94-146; *see* J.A. 55, 350-53; *Shaw*, 861 F. Supp. at 461.

On December 17, 1991, Speaker Blue, Senator Winner, and Representative Fitch were part of a small group invited to meet in Washington, D.C. with John Dunne, Assistant Attorney General for the Civil Rights Division. Senator Winner later told fellow senators in a floor speech that the "essence" of what Dunne said at this meeting "over, and over again" was that North Carolina "must have close to twenty-two percent black Congressmen, or black Congressional Districts in this State. **Quotas.**" J.A. 201 (emphasis added); J.A. 696-97; J.A. 56; *see also* J.A. 387-90. Dunne also told the delegation that **the shape of these districts did not matter, so long as there were two**. J.A. 698.

On December 18, 1991, the Justice Department denied preclearance of Chapter 601 and stated that the General Assembly could have created a second majority-minority district in the south central to southeastern part of North Carolina, but failed to do so "for pretextual reasons." J.A. 147-54. The Democratic leadership understood the Justice Department's objection letter as an endorsement of the Balmer 6.2 plan, which had a second majority-minority district stretching from Charlotte to Wilmington. *See* J.A. 200; Ex. 200, pp. 1189-90. North Carolina Democratic Congressman Charlie Rose viewed the Balmer 6.2 plan as a political threat to him. *See* Merritt Dep. pp. 12-15; J.A. 378-79. Several other North Carolina incumbent Democratic congressmen urged the State to seek preclearance of Chapter 601 by filing a declaratory judgment action in the

United States District Court for the District of Columbia. J.A. 68-77.

Senator Winner described the Justice Department's objection letter as a deliberate distortion of the Voting Rights Act. *See* J.A. 191, 196-202. Speaker Blue accused the Department of Justice of trying to corrupt the intent of the Voting Rights Act by imposing quotas and described Representative Balmer's 6.2 plan as "absolutely ridiculous." Blue Dep. Ex. 3 (Greg Trevor, *N.C. Lawmakers Stand Pat On Congressional Voting Plan*, Charlotte Observer, Dec. 20, 1991 at 1A).

Congressman Rose discussed his concern about the Justice Department's objection letter with his former administrative assistant John D. Merritt, then-Staff Director of the Joint Committee on Printing for the United States Congress, a committee then-chaired by Congressman Rose. With Congressman Rose's encouragement, Merritt began to explore the possibility of drawing a redistricting plan with two majority-African-American districts so as to minimally impact Rose's district. Merritt Dep. pp. 6-8, 13-15, 17-18; *see* J.A. 155-58.

Meanwhile, in mid-December 1991, state Representative Thomas Hardaway, an African American Democrat, asked the General Assembly staff to prepare a new congressional plan with two majority-African-American districts. Representative Hardaway resided in an area that was encompassed by Chapter 601's First District and was contemplating a run for Congress. In order to avoid a possible primary against Representative Michaux, an African American who resided in Durham, Hardaway told the staff to remove Durham from the northeastern majority-African-American district as it had been configured in Chapter 601 and place it in

a second majority-African-American district running along I-85 to Charlotte, a district very similar to an "I-85" district proposed by Representative Balmer in his "Balmer 8.1 plan." J.A. 58; J.A. 368-69; Cohen Dep. in *Pope v. Blue*, pp. 45-48; Ex. 10, p. 55 (Balmer 8.1); Ex. 10, p. 62 (Optimum II-Zero).

In December 1991, Representative Hardaway called Congressman Rose and asked him to consider Optimum II-Zero as a possible solution to the Justice Department's objection letter. As a result, Merritt received a copy of the plan from Hardaway. Merritt then delivered the Optimum II-Zero plan to the offices of the National Committee for an ffective Congress ("NCEC") in Washington, D.C. J.A. 58. The NCEC is a political action committee that provides election services to Democratic candidates, including advice on redistricting plans. J.A. 58, 688; Ex. 34, p. 15; Merritt Dep., pp. 25-27, 59-60; Merritt Dep. in *Pope v. Blue*, pp. 20-21.

Under Merritt's direction, the NCEC evaluated and revised the Optimum II-Zero plan.[4] The **"first objective"** Merritt gave the NCEC was to "see whether there was enough voting age population minority individuals" in North Carolina "for it to be possible to create two [majority] minority districts." Merritt and the NCEC found this "not an easy task" because "minorities in North Carolina do not all live together

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[4]Like the State of North Carolina, the NCEC used a sophisticated computer and a computer data base which contained information on race, but did not include data related to education, income, commuting patterns, or employment. Unlike the State's computer, however, the NCEC data base included results from North Carolina congressional elections and a software program known as the "Democratic Performance Index." With this program, election results for numerous past elections could be "amalgamated" to show an average performance rating for Democratic candidates on a precinct level. *See* J.A. 688-92.

in one or two neighborhoods" and are instead "very dispersed." J.A. 688-89.

After they achieved their "first objective" of drawing two majority-minority districts, Merritt and administrative assistants for incumbent Democratic Congressmen evaluated the district lines to minimize the effect that two majority-minority districts would have on their respective bosses. After the incumbent Democratic Congressmen reviewed and approved the revised plan, Merritt made the plan available to Cohen, Senator Winner, Representative Fitch, and Speaker Blue in early January, 1992. *See* Merritt Dep., pp. 23, 24, 40-41 61, 67-68; J.A. 58-59, 155-58. Cohen then loaded the plan into the State's computer. Cohen called the plan "92 Congress 1" and observed that it closely resembled the Balmer 8.1 plan and Hardaway's Optimum II-Zero plan. *See* T.T. 326-27, 500-05.

The General Assembly had scheduled a public hearing for January 8, 1992, to receive comments on congressional redistricting. In early January 1992, Mary Peeler, Executive Director for the North Carolina State Conferences of Branches of the NAACP, agreed that she would present Merritt's plan as her own at the public hearing, and she did so. *See* J.A. 58-59; Merritt Dep., pp. 32-35, 73-74; Ex. 200, pp. 621-23.

On January 9, 1992, Cohen advised Democratic leaders that, because the Justice Department was not concerned about geographic compactness, North Carolina had great discretion concerning the location of the two majority-African-American districts. Cohen added that redistricting was in the midst of a "computer revolution," and that it would be possible to create a district from the western-most portion of North Carolina in Murphy to the eastern-most portion in Manteo that "was 10 feet

wide" with "a half-million people in it." J.A. 248, 388-90; Stip. 87; Ex. 34, p. 17.

Between the January 8, 1992 public hearing and January 18, 1992, Cohen made several slight modifications to the Merritt-Peeler plan. Unlike Balmer 8.1 and Optimum II-Zero, the Merritt-Peeler plan did not include Winston-Salem in the I-85 Twelfth District. Cohen was instructed by Democratic leaders to reattach some of "the black precincts in Winston-Salem" to the proposed I-85 Twelfth District and to increase the percentages of African Americans in both the First and Twelfth districts. *See* Cohen Dep. in *Pope v. Blue*, pp. 65-66. During this phase of the redistricting process, the Merritt-Peeler plan had not yet been introduced as an official bill or even discussed by the Democratic leadership at any official meeting of the General Assembly. Nevertheless, sometime between January 8 and January 18, 1992, the Democratic leadership decided that the State would not challenge the Justice Department's objection letter and that the Merritt-Peeler plan would form the basis of the Congressional plan that would ultimately be adopted. T.T. pp. 355-83, 417-19; Ex. 34, p. 17.

On the weekend of January 18-19, 1992, the Democratic leadership released two plans that represented slight variations of the Merritt-Peeler plan. Ex. 34, p. 20; J.A. 59; Ex. 10, pp. 81-87 (Base Plan 7); Ex. 10, pp. 88-94 (Base Plan 8). After several minor changes, the General Assembly enacted Chapter 7 of the 1991 Extra Session Laws on January 24, 1992. J.A. 59-61.

North Carolina submitted its congressional redistricting plan, Chapter 7, to the Department of Justice for preclearance on January 28, 1992. J.A. 61. North Carolina's memorandum advocating preclearance states that Chapter 7 was based "in

large part on a plan presented by Mary Peeler of the NAACP at the public hearing held on January 8, 1992." J.A. 159. According to North Carolina's memorandum, Chapter 7's "**overriding purpose** was to comply with the dictates of the Attorney General's December 18, 1991 letter and **to create two congressional districts with effective black voting majorities**." J.A. 162 (emphasis added); Ex. 200, p. 955 (G. Cohen) (Justice Department is requiring North Carolina to create two majority-minority districts); J.A. 265, 286 (Rep. Fitch); J.A. 519-20 (Pope Test.); J.A. 701 (Winner Test.); *see also* J.A. 319 (Hofeller Test.); J.A. 332-33 (O'Rourke Test.); Stips. 96-97; Ex. 37. Cohen confirmed this admission by testifying that the **principal reason** for the creation of the First and Twelfth Districts was to ensure that Chapter 7 contained two majority-African-American districts. J.A. 675; T.T. p. 514.[5] By letter dated February 6, 1992, the Department of Justice precleared Chapter 7. J.A. 61.

Chapter 7 contains the now infamous First and Twelfth Districts. The First District's "lines take in some 28 different counties, though only nine in their entirety. It would take pages to describe this 2,039 -- mile journey, so suffice it to say that most areas of concentrated black population in east Carolina are in this seat. Some are urban -- black ghettos of Fayetteville, Rocky Mount, and New Bern -- but more are probably rural, and there are plenty of black tobacco farmers here." M. Barone & G. Ujifusa, *Almanac of American Politics* 945 (1994). "The 12th District is the most egregious example in the nation of the application, urged by blacks and Republicans, that the 1982 revisions of the Voting Rights Act require the maximization of

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[5]Nothing in the two-volume legislative history of the redistricting process (Ex. 200) or the submissions to the Justice Department explains the role played by Merritt and the NCEC in the drawing of Chapter 7. Cohen and Merritt confirmed Merritt's and the NCEC's role. *See* T.T. pp. 382-83, 417-18; J.A. 688-92; Merritt Dep. *passim*; J.A. 155-58; *see also* J.A. 410, 413.

black percentages in certain districts." *Id.* at 969; *see also* J.A. 314-15 (a person driving from the west end of the Twelfth District to the east end crosses in and out of the District twenty-one times; a person traveling east to west crosses in and out seventeen times); J.A. 332 (Twelfth District is the least compact in the nation). These descriptions are similar to those of this Court. *Shaw*, 113 S. Ct. at 2821; *see also* Ex. 301 (Map 1) (map of North Carolina's current congressional districts) (lodged with the Court).[6]

SUMMARY OF THE ARGUMENT

The district court unanimously found that the First and Twelfth Districts in Chapter 7 resulted from a racial gerrymander. Overwhelming direct and circumstantial evidence supports this finding, including, but not limited to: the bizarre shapes of the First and Twelfth Districts, the historical shapes of North Carolina's congressional districts, the preclearance demands of the Department of Justice for creating a second majority-minority district and the subsequent creation of the Twelfth District, the admissions of certain legislators and their staff, and the contemporaneous legislative history of Chapter 601 and Chapter 7.

Because race was the predominant factor in drawing the First and Twelfth Districts in Chapter 7, North Carolina's redistricting statute cannot be upheld unless it satisfies strict scrutiny. The district court erroneously concluded, however, that those challenging Chapter 7 not only had the burden of persuasion as to a racial gerrymander, but also as to whether the State was justified in using race to create the First and Twelfth Districts. Placing this burden on those challenging Chapter 7

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[6]A complete set of all of the maps contained in plaintiff-intervenors Exhibit 301 have been lodged with the Court.

conflicts with Supreme Court precedent concerning strict scrutiny. Once appellants proved a racial gerrymander, the district court should have imposed the burden of persuasion on the State to prove that Chapter 7 was narrowly tailored to achieve a compelling state interest by the least restrictive means practically available.

The district court's erroneous conclusion concerning the burden of proof infected the district court's remaining analysis of the States' alleged compelling interest and alleged narrow tailoring. First, it ignored the correct reading of Section 5 of the Voting Rights Act because (as in *Miller v. Johnson*, 115 S. Ct. 2475 (1995)) there was no reasonable basis to believe that North Carolina's earlier enacted redistricting plan (i.e., Chapter 601) could not be precleared under Section 5. Second, the district court clearly erred in finding that the General Assembly, in fact, enacted Chapter 7 as a remedy for a potential violation of Section 2 of the Voting Rights Act. It also ignored the correct reading of Section 2 of the Voting Rights Act by eliminating the geographical compactness requirement of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and adopting proportional representation. Thus, neither Section 5 nor Section 2 provides a compelling state interest for the racially gerrymandered First and Twelfth Districts.

Although the district court found that the First and Twelfth Districts are geographically non-compact by any objective standard, are among the least compact ever created in the United States, and are not the two most geographically compact majority-minority districts that could have been drawn, the district court erroneously concluded that the First and Twelfth Districts were narrowly tailored to achieve the State's alleged compelling state interest in complying with the Voting Rights Act.

I. The District Court Erred In Failing To Shift The Burden of Persuasion To The State To Prove That The Racially Gerrymandered Districts In Chapter 7 Were Justified By A Compelling State Interest And Were Narrowly Tailored To Address That Interest.

A. The District Court Properly Found Chapter 7 to be a Racial Gerrymander.

In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), this Court held that "a plaintiff challenging a [redistricting] plan under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. This conclusion was grounded in the mainstream of this Court's equal protection jurisprudence. *See id.* at 2825 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). Because the original *Shaw* plaintiffs made such an allegation, they stated a valid equal protection claim. *See id.* at 2832.

In *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995), the Court clarified a plaintiff's burden in successfully bringing a *Shaw* claim. The Court made clear that a district need not be bizarre on its face before there is a constitutional violation. Rather, a plaintiff may rely on direct or circumstantial evidence to establish race-based districting. *Id.* Specifically, in the context of alleged racial gerrymandering, a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 2488; *see also*

Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964) (requiring plaintiff to prove that the legislature was motivated by racial considerations or in fact drew districts along racial lines).

Race was the predominant factor in enacting the First and Twelfth Districts. *See Shaw*, 861 F. Supp. at 473-74, 476.[7] The evidence not only consisted of the bizarre shapes of both districts -- independently, relative to the shapes of the districts in Chapter 601, and relative to the historical shapes of North Carolina congressional districts,[8] but also the chronology of events between the enactment of Chapter 601 and Chapter 7 and the statements of Senator Winner, Gerry Cohen, Speaker Blue, John Merritt,[9] and the State's disregard of traditional race-neutral

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[7]In *Miller*, the Court used the phrase "predominant" or "overriding" factor in describing the role that race had to play in the enactment of a specific redistricting statute. *See Miller*, 115 S. Ct. at 2488. The Court apparently derived this phraseology from the district court's finding that race was the "predominant" or "overriding" factor in enacting Georgia's redistricting scheme. *Cf. Miller*, 864 F. Supp. 1354, 1366-67, 1374-78 (S.D. Ga. 1994). In *Village of Arlington Heights*, 429 U.S. at 265-66, the Court stated that a "discriminatory purpose" had to be "a motivating factor" in passing certain legislation. There is no inconsistency between the Court's phraseology in *Miller* and *Arlington Heights*. *Cf. Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995) (emphasizing principle of "consistency" in evaluating governmental racial classifications under Equal Protection Clause). Both *Miller* and *Arlington Heights* simply require a plaintiff to prove that race accounted for the decision to place a significant number of voters within or without a particular district. In any event, even if the Court in *Miller* intended to create a higher "predominant" or "overriding" factor standard in the context of racial gerrymandering, appellants have comfortably carried that burden in this case.

[8]A comparison of Chapter 7 with Chapter 601 and other congressional plans in effect from 1789 to 1992 demonstrates that Chapter 7 reflects a complete departure from customary and traditional districting principles used by North Carolina. *See* Notebook of Relevant Maps (lodged with Court) Ex. 53-63.

[9]*See supra* at 7-14; *infra* at 33-35.

districting principles, such as compactness, contiguity,[10] respect for political subdivisions, and the integrity of precincts.[11] This finding is not clearly erroneous and should not be disturbed. *See* Fed. R. Civ. P. 52.

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[10]Several districts established by Chapter 7 are "contiguous" only as a result of the novel concept of "point-contiguity." *See* Stip. 7. Under this theory of contiguity, districts may be connected at a point and space that has no dimension. Anyone standing at such a point is physically located in two congressional districts simultaneously. For example, no one can go from the northern to the southern end of the First District without crossing the Third District. By using this concept of contiguity, two "contiguous" districts could be drawn in the manner of a checkerboard, with the red and black squares each constituting a different congressional district which remain contiguous with themselves at the point where the corners of the two red and black squares touch. *See* T.T. pp. 476-77; J.A. 394-95; J.A. 335; *see also* Timothy G. O'Rourke, Shaw v. Reno: *The Shape Of Things To Come*, 26 Rutgers L.J. 723, 760 (1995). Chapter 7 contains at least ten instances of these devices, which permitted North Carolina to link narrow corridors of whites with larger pockets of African Americans. *See Shaw*, 861 F. Supp. at 469; Stip. 106; T.T. pp. 477-86; J.A. 240; J.A. 301; Ex. 42 (map showing locations of point contiguity in Chapter 7).

[11]The congressional districting plan in effect from 1982 to 1992 divided only four counties into two separate congressional districts. It divided no precincts. J.A. 62. Chapter 601 would have divided 34 counties and 12 precincts. *Id.* Chapter 7 divides 43 counties. *Id.* Of those, 36 are divided among two congressional districts, and seven are divided among three congressional districts. *Id.* Precinct-level information is available for 69 of North Carolina's 100 counties. In those 69 counties, Chapter 7 divides 80 precincts into separate congressional districts. Chapter 7 splits a total of approximately 110 precincts. Two of these precincts are divided into three congressional districts. *See id.*; Cohen Dep., p. 327. "[I]n most cases the precincts that were divided were to take out heavily from the minority concentrations and to put them either in the First or Twelfth Districts." Ex. 200, pp. 944-45 (G. Cohen); *see also* J.A. 393; T.T. pp. 623-26; J.A. 311-17.

B. Once Plaintiffs Proved a Racial Gerrymander, the State Should Have Had the Burden of Persuasion as to an Alleged Compelling State Interest and How the Plan Was Narrowly Tailored to Achieve That Interest.

The district court concluded that the appellants had the burden of proving not only that North Carolina's redistricting statute is a racial gerrymander, but also that the redistricting statute is not narrowly tailored to further a compelling State interest. *See Shaw*, 861 F. Supp. at 435-36. Appellants accept the burden of proving a racial gerrymander,[12] but reject the proposition that they also must prove that the redistricting legislation is not narrowly tailored to further a compelling State interest by the least restrictive means practically available.

In *Miller*, 115 S. Ct. at 2488, the Court discussed the "requirements of the proof necessary" to sustain an equal protection challenge under *Shaw*. Once the plaintiff proves that race was the predominant factor motivating the drawing of the challenged district, the State's "congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, [the Court's] most rigorous and exacting standard of constitutional review." *Id.* at 2490. "To satisfy strict scrutiny, the **State must demonstrate** that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.* (emphasis added).

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[12] *Hays v. Louisiana*, 839 F. Supp. 1188, 1198 & n.25 (W.D. La. 1993) (plaintiff bears the burden of proving that "the plan's irrational shape reflects racial gerrymandering") (footnote omitted), *vacated and remanded on other grounds*, 512 U.S. ___, 114 S. Ct. 2731 (1994).

Imposing this burden on the State is not novel under the Equal Protection Clause.[13]

Sound policy fully supports the allocation of proof advanced by the appellants in this case and set forth in *Miller*. Once plaintiffs prove a racially gerrymandered districting plan -- the existence of the State's justification for a particular districting plan -- a compelling State interest narrowly tailored to meet that interest by the least restrictive means practically available -- is a defense.[14] The burden of producing evidence and proving a defense is normally on the party asserting it. *See* 2 Restatement (Second) of Torts §§ 454-461, 463-467 (1965). Moreover, economy in litigation favors assigning the burden of producing evidence to the party that can produce the evidence at

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[13] *Adarand Constructors, Inc.*, 115 S. Ct. at 2111 ("Any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting the person to unequal treatment under the strictest judicial scrutiny."); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) ("[t]o satisfy strict scrutiny, the State must show that [the challenged statute] furthers a compelling state interest by the least restrictive means practically available"); *In re Griffiths*, 413 U.S. 717, 721-22 (1973) ("In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.") (footnotes omitted); *see also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would not have been enacted without this factor."); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-87 (1977) (same); *cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (in the context of intermediate scrutiny, the State must carry the burden of proving "an exceedingly persuasive justification" for a statute that classifies individuals by their gender).

[14] Indeed, North Carolina's "Fourth Defense" and "Fifth Defense" in its Answer assert that North Carolina had a compelling interest in complying with Section 2 and Section 5 of the Voting Rights Act and that the redistricting plan was narrowly tailored to further those interests. *See* Answer pp. 6-7.

least cost. *See* 2 *McCormick on Evidence* § 337, at 429-30 (4th ed. 1992); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 300 [03] (1988). The State can more easily produce evidence and persuade the factfinder of how its districting legislation is allegedly narrowly tailored to achieve a compelling interest. This is particularly true where (as happened in this case) legislators may assert legislative privilege as to their legislative activities and thereby thwart a litigant's effort at disproving the State's alleged justification.[15] If such a justification exists, the State should produce evidence and prove it. *See* James F. Blumstein, *Racial Gerrymandering and Vote Dilution*: Shaw v. Reno *in Doctrinal Context*, 26 Rutgers L.J. 518, 589-92 (1995) (criticizing analysis of the allocation of the burden of proof by the district court in *Shaw v. Hunt* as inconsistent with "the long history and understanding of strict scrutiny").[16]

The district court erroneously relied on *Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *Richmond v. J.A. Croson*

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[15]Within the Democratic leadership, only Senator Winner and Representative Fitch waived their legislative privilege and testified about their legislative activity. Speaker Blue refused to waive his legislative privilege as to his legislative activity, but the district court did order him to answer questions about 19 newspaper articles designated as Blue Deposition Exhibits 1-19 published in various North Carolina newspapers between 19 December 1991 and 7 February 1992. J.A. 18. The district court limited the Order to (1) whether the statements attributed to him were, in fact, his statements; and (2) whether the statements reflected his belief at the time. *Id.* Subsequently, Speaker Blue did respond affirmatively to these narrow questions about his statements and about an editorial that he published. *See* Supplemental Response by Daniel T. Blue to Questions Asked at His Deposition; J.A. 163.

[16]Placing the burden on the State to justify a racial gerrymander will not be onerous or unusual given the State's similar burden under Section 5 to show that a voting change will not have the purpose or effect of denying minorities the right to vote. *See* 28 C.F.R. § 51.52 (1995).

Co., 488 U.S. 469, 494 (1989), in support of its position. *See Shaw*, 861 F. Supp. at 436. These cases provide no support.

Batson simply means that a party challenging a preemptory strike as race-based must prove that the peremptory strike was, in fact, race-based. *See Batson*, 476 U.S. at 93-94 & n.18. As in *Batson*, appellants acknowledge the burden of proving a race-based redistricting scheme as set forth in *Shaw* and *Miller*. *Batson*, however, does not discuss a scenario whereby the State then attempts to justify a race-based preemptory strike as narrowly tailored to achieve a compelling interest.

In *Wygant*, Justice O'Connor, writing for herself, stated that where a school district attempts to justify a race-based layoff system as a remedy for prior discrimination by introducing statistical evidence of its "remedial" purpose, those challenging the plan continue to have the burden of persuasion that the school district lacked a remedial purpose or that the plan was not narrowly tailored. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring). The Chief Justice, Justice Rehnquist, and Justice Powell simply stated that those challenging the plan bear the burden of proving the unconstitutionality of the race-based layoff system. *Id.* at 277-78. Thus, the Court in *Wygant* did not explain the allocation of the burden of proof and the burden of persuasion as to a justification for "remedial" racial discrimination. *Cf. Adarand Constructors, Inc.*, 115 S. Ct. at 2109 (acknowledging that "[t]he Court's failure to produce a majority opinion in *Bakke, Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based government action").

Finally, in *Croson*, after the plaintiff proved that the city enacted a "minority business utilization plan" that required prime contractors to subcontract at least 30% of the dollar amount of city construction contracts to one or more minority

business enterprises, the city then had the burden of justifying its conclusion that remedial action was necessary. *See Croson*, 488 U.S. at 500. Absent a "strong basis in evidence" for remedial action, the city would lose. *Id.* Because the city failed in this endeavor, it lost. *See id.* at 505 ("[T]he city . . . failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."). If "skepticism" and "consistency" mean anything with respect to race-based governmental action, the State must bear the burden of persuasion and justify such action under strict scrutiny. *Adarand Constructors, Inc.*, 115 S. Ct. at 2111.

II. Section 5 Of The Voting Rights Act Was Not A Compelling Interest Justifying Chapter 7.

A. The General Assembly Lacked A "Strong Basis in Evidence" for Believing That Section 5 Required Two Majority-African-American Districts.

The district court found that the General Assembly's "dominant concern" in not filing a legal challenge against the denial of preclearance of Chapter 601 was a "perception" that any congressional redistricting plan "which did not contain at least two majority-minority districts, would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so)." *Shaw*, 861 F. Supp. at 463. As a basis for the General Assembly's alleged knowledge of Section 5's requirements, the district court noted that 58 of the 170 members of the General Assembly (i.e., 34%) had been members of the 1981 General Assembly and that the 1981 General Assembly's original congressional redistricting plan had been denied Section 5 preclearance. *See id.* Additionally, the district court cited the Department of Justice's failure to preclear Chapter 601 as a basis for a majority of the General Assembly's

belief that the failure to have at least two majority-African-American districts "would, or might well" violate Section 5. *See id.* at 473.

The district court's analysis is severely flawed. No logical connection can be drawn between the denial of the initial congressional redistricting plan enacted in 1981 and a purported belief by a majority of the General Assembly in 1992 that only a congressional districting plan with two majority-African-American districts could be precleared under Section 5. After all, the 1981 General Assembly ultimately enacted a plan without any majority-African-American districts and that plan received preclearance. J.A. 67. Similarly, that the Department of Justice objected to Chapter 601 does not provide a strong basis in evidence for the conclusion that Section 5 required the creation of a second majority-African-American district. *See Miller*, 115 S. Ct. at 2491. In sum, without any contemporaneous support in the legislative history, the district court took the word of the State that a silent "majority" of the General Assembly really believed that the failure to create two majority-African-American districts "would, or might well" violate Section 5. *Shaw*, 861 F. Supp. at 463, 473.

Just as this Court will not "accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues" (*Miller*, 115 S. Ct. at 2491), this Court should not accept a state's assertion that remedial action under the Voting Rights Act would or "might well be" required. Rather, this Court must "insist on a strong basis in evidence of the harm being remedied." *Id.* Moreover, where a state relies on its own determination that race-based districting is necessary to comply with the Voting Rights Act, "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a

compelling interest." *Id.* If this Court were to accept the district court's "might-well-violate-the-Voting-Rights-Act" standard and thereby "insulate racial redistricting from constitutional review, [this Court] would be surrendering [its] role in enforcing the constitutional limits on race-based official action." *Id.*

B. As in *Miller v. Johnson*, Section 5 Does Not Justify Chapter 7.

Section 5 of the Voting Rights Act requires certain jurisdictions to obtain preclearance of newly-created electoral districts. Thus, before a "covered jurisdiction" may change electoral districts, the covered jurisdiction must demonstrate that the intended changes do not have a discriminatory "purpose" or "effect." 42 U.S.C. § 1973c (1988).

A covered jurisdiction may demonstrate a lack of discriminatory "purpose" or "effect" by obtaining either (1) a favorable declaratory judgment from the United States District Court for the District of Columbia, or (2) preclearance from the Attorney General of the United States. *Id.* The Voting Rights Act defines certain covered jurisdictions, including 40 counties within North Carolina. *See* J.A. 62-63. A covered jurisdiction may implement changes absent an adverse declaratory judgment or an objection from the Department of Justice. If the covered jurisdiction disagrees with an objection by the Department of Justice, it may then file a declaratory judgment action in the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

Miller v. Johnson mandates the rejection of North Carolina's attempt to equate its reliance on the Justice Department's interpretation of Section 5 with a "compelling state interest." In *Miller*, the Court found that "there is little doubt that [Georgia's] true interest in designing the Eleventh

District was creating a third majority-black district to satisfy the Justice Department's preclearance demands." *Miller*, 115 S. Ct. at 2490. In rejecting Georgia's reliance on the Justice Department's determination that race-based districting was necessary to comply with the Voting Rights Act, the Court made clear that both the State and the Court have an independent obligation to evaluate the Justice Department's analysis. *See id.* at 2491-92.

The Court in *Miller* noted that "Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%)." *Id.* at 2492. These plans, therefore, were "ameliorative" under Section 5 and could not violate Section 5's nonretrogression principle. *Id.* (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). This conclusion eliminated any viable reliance by the Department of Justice or Georgia on the "effects" prong of Section 5. *See id.*

The Court then turned to the "purpose" prong of Section 5. The Court observed that the Department of Justice denied preclearance to Georgia's earlier plans because "the submitted plans violated § 5's purpose element." *Id.* The key to the Justice Department's position was that "Georgia failed to offer a non-discriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district." *Id.* The Court resoundingly rejected the Justice Department's view that refusing to create as many majority-minority districts as possible supported an inference that Georgia had a discriminatory purpose. *See id.* at 2492-93.

The chronology of events in Georgia and North Carolina are strikingly similar. As in *Miller*, North Carolina's "overriding purpose" in designing the Twelfth District was to satisfy the Justice Department's preclearance demands for proportional

representation of African Americans in North Carolina through the creation of a second majority-African-American congressional district. In fact, North Carolina's submission seeking preclearance of Chapter 7 says so. *See* J.A. 162.

Moreover, as in *Miller*, Chapter 601 was "ameliorative," a term the Court "has used to describe plans increasing the number of majority-minority districts[.]" *Miller*, 115 S. Ct. at 2492. Specifically, Chapter 601 increased the number of majority-African-American districts from zero out of eleven (0%) to one out of twelve (8.3%). Chapter 601, therefore, could not violate Section 5's nonretrogression principle or the "effects" prong of Section 5.

The Department of Justice denied preclearance to Chapter 601 because Chapter 601 allegedly violated Section 5's purpose element. *See Shaw*, 861 F. Supp. at 441. The "key" to the Department of Justice's position was that North Carolina had not created two majority-minority districts out of the twelve districts to be created -- a number specifically selected by the Justice Department because it was roughly proportional to the percentage of African Americans in North Carolina's general population. *Cf. Miller*, 864 F. Supp. at 1385 (noting the same proportionality rationale in requiring Georgia to create three majority-African-American districts). North Carolina's failure, however, to create "as many majority-minority districts as possible [in Chapter 601] does not support an inference that [Chapter 601] "so discriminates on the basis of race or color as to violate the Constitution[.]" *Miller*, 115 S. Ct. at 2492 (quoting *Beer*, 425 U.S. at 141). Moreover, using Section 5 "to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and [what the Court has] upheld." *Id.* at 2493. Thus, North Carolina's compliance with

the Justice Department's interpretation of Section 5 did not provide a compelling state interest.

III. The District Court Erred In Finding That The North Carolina General Assembly Actually Or Properly Relied On Section 2 Of The Voting Rights Act As A Compelling State Interest Justifying Chapter 7.

The district court stated that a state has "a 'compelling' interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has 'strong basis in evidence' for concluding that such action is 'necessary' to prevent its electoral districting scheme from violating the Voting Right Act." *Shaw*, 861 F. Supp. at 437. Furthermore, the district court concluded that North Carolina's redistricting plan was motivated and warranted by the State's purported desire to comply with Section 2 of the Voting Rights Act. *Id.* at 473-74.

States "certainly have a very strong interest in complying with the federal anti-discrimination laws that are constitutionally valid as interpreted and as applied." *Shaw*, 113 S. Ct. at 2830. Race-based redistricting is not justified, however, where the challenged district is "not required by the Voting Rights Act under a correct reading of the statute." *Miller*, 115 S. Ct. at 2491. Moreover, the district court clearly erred in concluding that North Carolina actually relied on, much less, properly relied on, Section 2 of the Voting Rights Act in enacting Chapter 7.

A. The District Court's Finding That the North Carolina Legislature Enacted Chapter 7 in Order to Avoid Violating Section 2 of the Voting Rights Act is Clearly Erroneous.

The district court found that it was "[b]eyond any question" that the "dominant concern" of the legislature in deciding not to challenge the denial of preclearance of the Chapter 601 plan and, ultimately, to enact Chapter 7 (including the First and Twelfth Districts) was a perception "by a sufficient majority" of the General Assembly that any fewer than two majority-African-American districts "would, or might well" violate the Voting Rights Act. *Shaw*, 864 F. Supp. at 463, 473.[17] As evidence of the 1991-92 General Assembly's alleged knowledge of Section 2, the district court noted that the 1986 General Assembly had been involved in the *Thornburg v. Gingles*, 478 U.S. 30 (1986), Section 2 litigation and that "well over half" of the members of the 1986 General Assembly were also in the 1991 General Assembly. *See Shaw*, 864 F. Supp. at 463. Additionally, the General Assembly allegedly was aware that various groups had complained that Chapter 601 violated the Voting Rights Act because it did not contain two majority-minority districts. *See id.* Finally, the district court believed that the Democratic leadership had the "general perception" that "the African-American minority" could make out a *prima facie* Section 2 case with respect to any congressional districting plan that did not include two majority-minority districts. *See id.* at 464.

"[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme."

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[17] As with its Section 5 analysis, the district court's "might-well-violate-the-Voting-Rights-Act" standard is deeply flawed.

Weinberger v. Wiesenfeld, 420 U.S. 645, 648 (1975) (footnote omitted). The Court will not accept alleged assertions of legislative purpose when, as in this case, "an examination of the legislative scheme and its history demonstrate that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 n.16.

Section 2 of the Voting Rights Act prohibits the dilution of a minority group's voting strength. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court devised a test for evaluating whether plaintiffs challenging multi-member districts had made a threshold showing of unequal electoral opportunity:

> First, they must show that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." Second, they must prove that the minority group is "politically cohesive." Third, the plaintiffs must establish "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Voinovich v. Quilter, 113 S. Ct. 1149, 1157 (1993) (quotations omitted). *Gingles* preconditions also apply to single-member districts. *Growe v. Emison*, 113 S. Ct. 1075, 1084-85 (1993). Unless all three requirements are established, "there neither has been a wrong nor can there be a remedy." *Growe*, 113 S. Ct. at 1084 (footnote omitted). Moreover, satisfying these conditions is necessary, but not always sufficient, to prove a Section 2 violation. *See Johnson v. De Grandy*, 114 S. Ct. 2647, 2656 (1994).

The district court's findings concerning the General Assembly's alleged desire in January 1992 to remedy a Section

2 violation by enacting Chapter 7 are not only clearly erroneous, they are remarkably disingenuous. *See Shaw*, 861 F. Supp. at 480-82 (Voorhees, C.J., dissenting). On October 14, 1991, the very same General Assembly Democratic leadership that was in power in January 1992 submitted a detailed memorandum to the Justice Department in support of Chapter 601, including its single majority-African-American district. Cohen drafted the memorandum on behalf of Speaker Blue, Senator Winner, and Representative Fitch. J.A. 94-95. The General Assembly's Democratic leadership informed the Justice Department that a majority-minority or majority-African-American district should not be created where the minority population was dispersed and not geographically compact (J.A. 103, 112), that North Carolina lacked conclusive evidence that any "compact" majority-African-American congressional district could be drawn, but that the General Assembly's legislative leadership had decided to draw one (J.A. 133), and that because of the geographically dispersed nature of North Carolina's African-American population, North Carolina could create only one reasonably compact majority-African-American congressional district. J.A. 133-34. Additionally, North Carolina believed that a district was not geographically compact within the meaning of *Gingles* "if its members and representatives could not easily tell who actually lived in the district" (J.A. 109) and that a majority-African-American district was not compact within the meaning of *Gingles* if it was "materially stranger" in shape than the congressional districts proposed in Chapter 601. J.A. 112-14, 129.

North Carolina also emphasized the importance of "traditional districting principles." Specifically, North Carolina believed that the State's criteria of attempting to avoid split precincts made residents more likely to know who lived in a district, enhanced political organization efforts, and helped to avoid a "nightmare" of election administration that would result

from splitting a large number of precincts. J.A. 105-09. The State further argued that the greater the number of counties in a district, the less likely there is to be any community of interest and the more likely that such a district would be uncompact and unrepresentable under *Gingles*. J.A. 123.

As for "racially polarized voting," in the ten counties that ultimately would be contained in the "I-85" Twelfth District of Chapter 7, North Carolina stated that there was not racially polarized voting in Durham, Guilford, Mecklenburg, Alamance, Orange, and Forsyth counties. *See* J.A. 98; T.T. pp. 496-97.[18] Moreover, of the remaining four counties that would be included in the Twelfth District (i.e., Gaston, Iredell, Rowan and Davidson), only Gaston County is a Section 5 covered county. *See* J.A. 63. North Carolina also argued that the findings by the district court in *Gingles* were ten years old, that those conditions "cannot be assumed to be true today," and that there has been no evidence of racial appeals in the last decade, other than those attributed to Senator Helms in late stages of his 1990 campaign. J.A. 95-98.

The October 14 memorandum severely criticized Representative Balmer's "Balmer 8.1" plan, which contained two majority-African-American congressional districts, including the original version of the "I-85" district. T.T. p. 461. The State argued that "[b]oth minority districts in Balmer 8.1 fail the compactness tests" and that the proposed I-85 district:

> defied imagination [by] stretching for 125 miles from Charlotte to Caswell County, never being more than 5 miles wide, and for considerable

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[18]The majority of the population in the Twelfth District resides in the urban areas of Durham, Guilford, Forsyth, and Mecklenburg Counties. *See* T.T. p. 496.

> stretches appearing from the map . . . to be a mile wide or less. It then arks in a curve another 50 miles into Durham. Along the way it has tendrils into Winston-Salem, Reidsville, and Burlington. It would be preposterous to say that this district is compact.

J.A. 129.

Nothing in the legislative history of Chapter 7 indicates that the General Assembly ever rejected or reassessed the findings and conclusions set forth in the October 14, 1991, memorandum to the Justice Department. In fact, during the trial Cohen testified that he believed everything in his October 14, 1991, memorandum to be accurate when he prepared and submitted it. J.A. 387.

The analysis in the October 14, 1991, memorandum is "powerful evidence" that the General Assembly subsequently subordinated "traditional districting principles to race when it enacted a plan creating [two] majority-black districts . . . ." *Miller*, 115 S. Ct. at 2490. It is also powerful evidence that the General Assembly did not create the First and Twelfth Districts in order to remedy a Section 2 violation.

The contemporaneous legislative history also demonstrates that the First and Twelfth Districts in Chapter 7 were not motivated by Section 2. Senator Winner argued that it was impossible to draw majority-minority districts in North Carolina without having badly distorted and contorted districts and that the Voting Rights Act did not require such districts. *See* J.A. 191-92, 196-201 (Sen. Winner); Ex. 40 (editorials published by Sen. Winner); *see also* J.A. 226-28 (Sen. Odom) (neither the Voting Rights Act nor common sense requires the First and Twelfth Districts); J.A. 702-03 (Winner Test.). Representative

Fitch believed that Chapter 7 "went beyond" what the Voting Rights Act required. J.A. 265 (Rep. Fitch). Speaker Blue believed that "North Carolina's minority population is not sufficiently concentrated in any one area to draw a compact minority congressional district [with 550,000 people], that the Voting Rights Act did not require "stringing together small pieces of black voters all over the state" as was done in Chapter 7, and that the Justice Department had erroneously interpreted the Voting Rights Act to require just such conduct. J.A. 163-65; J.A. 61. Finally, the legislative history is bereft of any mention by any legislator[19] of the need to "remedy" a potential Section 2 violation by creating the First and Twelfth Districts. *Shaw*, 861 F. Supp. at 480-82 (Voorhees, C.J., dissenting) (analyzing the legislative history). Chief Judge Voorhees aptly concluded that the State's contention that the General Assembly was "actually motivated" by Section 2 is belied by the substantial, contemporaneous evidence to the contrary, has "no support in the record," and is made by the State "as a matter of convenience to justify its unconstitutional behavior in enacting Chapter 7." *Id.* at 481.

There is only one rational explanation for North Carolina's conduct in enacting Chapter 7. After the Justice Department denied preclearance of Chapter 601, Cohen, Winner, Fitch, and other Democratic leaders believed that the shape of the districts and the concept of geographic compactness were irrelevant to the Department of Justice - so long as the State met the proportional representation requirement of two majority-African-American districts. *See* J.A. 248 (G. Cohen); J.A. 698 (Sen. Winner); J.A. 258, 418-19, 426 (Rep. Fitch). Geographic

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[19]The district court cited the statements of certain witnesses at various public hearings as evidence of the General Assembly's intent in enacting Chapter 7. *See Shaw*, 861 F. Supp. at 466. Such statements should not be accorded any weight. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

compactness and all of the other *Gingles* factors thus became meaningless to the General Assembly based upon its belief, ultimately shown to be well-founded, that the Justice Department would preclear any congressional plan that provided proportional representation to African Americans.

B. Even if the General Assembly Believed that Not Having Two Majority-African-American Districts Would or Might Well Violate Section 2, Such a Belief was Inconsistent with a Correct Interpretation of Section 2.

Even if the North Carolina General Assembly actually was concerned that not having two majority-African-American districts "would or might well" violate Section 2 and enacted Chapter 7 as a remedy, a proper reading of Section 2 demonstrates that the General Assembly lacked a "strong basis in evidence" to conclude that the failure to include two majority-African-American districts would violate Section 2. *Cf. Miller*, 115 S. Ct. at 2491 (the judiciary retains an independent obligation to review the State's alleged "strong basis in evidence of the harm being remedied").

Proponents of a Section 2 remedy must prove the existence of all three *Gingles* preconditions. They cannot be assumed. *Growe*, 113 S. Ct. at 1085; *Gingles*, 478 U.S. at 46. The *Gingles* showing of a "sufficiently large" and "geographically compact minority" is needed to establish "that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe*, 113 S. Ct. at 1084; *Gingles*, 478 U.S. at 50 n.17. Absent such potential, the minority group "cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17.

Section 2 cannot be used to justify North Carolina's redistricting plan because the General Assembly lacked a strong basis in evidence for believing that a minority group would be able to justify the First and Twelfth Districts under the minimal requirements of a Section 2 violation set out in *Gingles*, preconditions reaffirmed in *Voinovich*, 113 S. Ct. at 1157, and *Growe*, 113 S. Ct. at 1084-85. Specifically, North Carolina's First and Twelfth Districts fail the *Gingles* "compactness" requirement. *See* J.A. 318. "This aspect of *Gingles*, like *Shaw*, presupposes legislative districts that have geographical integrity and satisfy traditional districting standards." *Vera v. Richards*, 861 F. Supp. 1304, 1342 n.54 (S.D. Tex. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995). One look at the First District and the Twelfth District reveals that no one was motivated by the need to remedy a Section 2 violation by African Americans living in what now constitutes those districts. *See Shaw*, 861 F. Supp. at 483 (Voorhees, C.J., dissenting).

Ironically, North Carolina's October 14, 1991, memorandum to the Justice Department reflects North Carolina's understanding that a legitimate Section 2 remedy must be connected to the geographically compact group of minorities allegedly injured by vote dilution because any minority plaintiffs would have "to show how the *Gingles* findings apply to the districts they cite." J.A. 99.[20] The rationale

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[20]The Solicitor General also recognized this basic point about the shape of a district and an alleged Section 2 justification for that district during oral argument in *Hays v. Louisiana*, No. 94-558, 1995 WL 243450, at 23-24 (U.S. Oral Arg. Apr. 19, 1995):

> QUESTION: In other words, if you flunk the bizarreness test, you're necessarily going to flunk any attempt to get section 2 justification because it won't be compact with *Gingles* . . . ?
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for such a position is obvious: if a geographically compact group of minorities has been injured as a result of vote dilution, that injury is not remedied by placing a majority-minority district in a completely different location in the State. Any such district could not achieve the purported state interest of protecting the State from Section 2 liability. After all, members of the group injured by vote dilution could still prove their claim - regardless of the State's decision to form a district somewhere else.

Because the General Assembly lacked a "strong basis in evidence" that a minority group residing in the First and Twelfth Districts would satisfy the threshold requirement of geographic compactness under *Gingles*, any claim that Section 2 justifies the districts in Chapter 7 falls flat, and the inquiry under Section 2 must be terminated. *See Shaw*, 861 F. Supp. at 483 (Voorhees, C.J., dissenting). Indeed, this is precisely the argument made by the Solicitor General, and relied upon by this Court in vacating a district court decision in *Statewide Reapportionment Advisory Committee v. Theodore* ("*SRAC*"), 113 S. Ct. 2954 (1993) (per curiam). In *SRAC*, the U.S. Department of Justice -- through the Solicitor General -- made the following argument:

> The district court purported to apply the three fundamental requirements identified in *Gingles* -- size and compactness of minority concentrations, minority political cohesiveness, and majority bloc voting -- so as to "insur[e] that

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GENERAL DAYS: Now, on the question of whether a district is found bizarre by the Court, then what happens at that point of meeting strict scrutiny and showing a compelling interest [and] narrow tailoring. I think that if bizarreness were found, it might be impossible to satisfy the claim that it was a strong basis in evidence for thinking that a section 2 violation might occur.

> the court's plan [would] not violate the threshold requirements for liability under § 2." *Properly applied, that approach might be an appropriate way for a court to avoid an unnecessarily extensive Section 2 inquiry.* If, for example, the court had found that voting in South Carolina elections was not racially polarized, any Section 2 claim would have been destined to failure under *Gingles*, and *there would have been little point in taking other evidence or making other findings relevant to such a claim.*

Brief for the United States as Amicus Curiae at 12-13 in *SRAC* (citations omitted) (emphasis added). The Justice Department further argued that "the district court did not respond adequately to the question whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas . . . ." *Id.* at 13. This Court accepted the Solicitor General's argument, vacated the district court's decision, and remanded for reconsideration in light of the Solicitor General's position. *SRAC*, 113 S. Ct. at 2954. As in *SRAC*, because at least one of the *Gingles* threshold requirements cannot be met, the Section 2 inquiry is over.

C. The District Court's Interpretation of Section 2 Mandates Proportional Representation.

The appellees' approach -- accepted by the district court -- rests on a mechanistic assumption that Section 2 requires the maximization of African American electoral opportunity, no matter what the configuration of the district. Implicit in the appellees' disregard for the *Gingles* compactness precondition is the premise that the Voting Rights Act mandates proportional representation.

Although the Voting Rights Act prohibits any redistricting scheme which minimizes or dilutes the voting strength of racial minorities, it does not require the *maximization* of minority voting strength. *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), underscores this point. "Failure to maximize cannot be the measure of § 2." *Id.* at 2660.

The Voting Rights Act specifically and properly disclaims any congressional intent to establish any right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973(b).[21] Nor does the statute require that legislatures adopt or courts impose a quota system for the election of minorities. To permit a legislature to "assume" a Section 2 challenge and "assume" that such challenges might "prevail," and thereby permit the legislature to create race-based districts in proportion to the minority's population, in effect, validates proportional representation.

Nonetheless, the district court accepted the State's justification for North Carolina's racial gerrymandering plan as necessary to insulate the State from a potential Section 2 challenge. *See Shaw*, 861 F. Supp. at 463-64. To accept the district court's view of the Act, this Court must accept a view of redistricting that leads to proportional representation, a view which not only conflicts with the Act, but also with the Constitution and fundamental principles of representational democracy. As the Court in *Shaw* observed:

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[21]Section 2 provides "that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Shaw, 113 S. Ct. at 2827;[22] *see also Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting). This Court should not endorse a maximization requirement in the face of Congress' explicit disclaimer of any intent to create a quota system for any group of voters.

IV. The District Court Erred In Concluding That Chapter 7 Was Narrowly Tailored To Further A Compelling State Interest By The Least Restrictive Means Practically Available.

A. The District Court Erroneously Concluded That A State Could "Remedy" An Alleged Section 2 Violation By Placing A Purportedly Remedial District Anywhere In The State.

The district court admitted that the First and Twelfth Districts are geographically non-compact by any objective standard, and are, in fact, among the least compact ever created. *Shaw*, 861 F. Supp. at 469. The court also admitted that they are

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[22]This concern about the impact that such districts have on the mindset of elected officials from such districts is not imaginary. Representative Mel Watt, who currently represents North Carolina's Twelfth District, testified that one of the benefits of representing the district is not "having to cater to the business or **white community**." J.A. 511 (emphasis added); *see also* J.A. 540-41.

not the two most geographically compact majority-minority districts that could have been drawn, as evidenced by the numerous alternatives introduced into evidence. *Id.* By distorting precedent, logic, and common sense, the district court nevertheless concluded that the challenged districts were "narrowly tailored" to achieve their alleged remedial purpose of compliance with Section 2 and Section 5 of the Voting Rights Act.

The district court's narrow tailoring inquiry eliminated traditional districting principles such as geographic compactness, contiguity, and respect for the integrity of political subdivisions from the relevant calculus. Specifically, the district court concluded that the only factors pertaining to the shape and size of a district that bear on narrow tailoring are constitutional limits, *e.g.*, compliance with the one person/one vote principle and the right of an identifiable group of voters not to have their votes diluted. *See Shaw*, 861 F. Supp. at 449; *cf. Vera*, 861 F. Supp. at 1343 n.55 (criticizing the district court's reasoning). This approach permitted the district court to leap from its belief that "the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts" (*Shaw*, 861 F. Supp. at 463), to the conclusion that North Carolina had *carte blanche* to place the two "remedial" districts *anywhere* in the State.

This aspect of the district court's analysis of narrow tailoring ignores the special breed of harms recognized by the Supreme Court in *Shaw*, "a breed of harms 'analytically distinct' from any associated with the mere intent to discriminate." *Shaw*, 861 F. Supp. at 477 (Voorhees, C.J., dissenting). This Court underscored those analytically distinct harms as follows:

> Put differently, we believe that reapportionment is one area in which *appearances do matter*. A

> reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

Shaw, 113 S. Ct. at 2827. In *Miller*, this Court reaffirmed those harms and emphasized how traditional race-neutral districting principles mitigate such harms. *Miller*, 115 S. Ct. at 2488-90. Thus, the district court erred in concluding that traditional race-neutral districting principles are irrelevant to the narrow tailoring inquiry. *See Shaw*, 861 F. Supp. at 489-90 (Voorhees, C.J., dissenting).

The district court's approach also conflicts with *Shaw*'s unequivocal statement that a redistricting plan that deliberately creates majority-minority districts in order to comply with the Voting Rights Act is not "narrowly tailored" to that goal if it goes "beyond what was reasonably necessary" to comply with the Act. *See* 113 S. Ct. at 2831; *Shaw*, 861 F. Supp. at 491 (Voorhees, C.J., dissenting). Obviously, if a legislature is designing a plan to remedy an alleged Section 2 violation, it first must consider the geographical compactness requirement of Section 2. Moreover, the proposed remedy must be *tailored* to that alleged Section 2 violation. *Croson*, 488 U.S. at 507 (in the context of narrow tailoring, the government's remedy must be narrowly tailored to achieve the government's compelling State interest). Otherwise, the alleged remedy can be totally divorced from the compelling state interest of avoiding a specific Section 2 violation and can leave those in need of the "remedy" with no remedy at all. *Cf. Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (under *Gingles*, "[t]he inquiries into remedy and liability . . . cannot be separated: A district court must determine

as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system"), *cert. denied*, 115 S. Ct. 1795 (1995).

The district court's narrow tailoring analysis simply ignores the *Gingles* requirement that a minority group demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single member district" and accepts a theory of "virtual" representation. *Gingles*, 478 U.S. at 50 n.17. This Court in *Gingles* could have interpreted Section 2 to permit legislative districts to be drawn anywhere in a State, regardless of geographic compactness. Alternatively, it could have interpreted Section 2 to permit states to draw non-contiguous districts and thereby combine small, disparate minority populations. *Cf. Shaw*, 861 F. Supp. at 485 n.17 (Voorhees, C.J., dissenting) (discussing contiguity). This Court's explicit and definitive choice of the *geographical* compactness requirement described in *Gingles*, however, quite properly recognizes that Section 2 was not intended to trample traditional geographic-based representation on which all State and federal legislative bodies are fundamentally premised. *See Gingles*, 478 U.S. at 50 n.17; *cf. Miller*, 115 S. Ct. at 2488-90 (emphasizing traditional race-neutral districting principles); *Shaw*, 113 S. Ct. at 2826-27 (same). Indeed, if the first *Gingles* requirement is discarded, proportional representation and bizarre districts will become the norm.

In rejecting geographical compactness and other race-neutral districting principles as relevant to narrow tailoring, the district court relied upon an alleged absence of "judicially manageable standards" to assess whether "a particular redistricting plan deviates from these principles to a greater extent than is necessary to accomplish the state's compelling interest." *Shaw*, 861 F. Supp. at 452. It bolstered this conclusion with a reference to the "political thicket" of

legislative reapportionment and the need for "unelected federal judges" to exercise judicial restraint. *See id.* at 453-54. The district court's solution was to abdicate its role in performing strict scrutiny by disavowing the need for any fit between the legislature's end (*i.e.*, the compelling state interest of remedying a potential Voting Rights Act violation) and the means chosen (*i.e.*, the redistricting statute).

The district court's concern about the lack of "judicially manageable standards" ignores that it supposedly was reviewing North Carolina's attempt to remedy a potential Voting Rights Act violation. Thus, the inquiry under strict scrutiny begins with the alleged Voting Rights Act violation. *See Shaw*, 113 S. Ct. at 2831. For example, in connection with Section 2, this means understanding the *Gingles* requirements. Courts routinely grapple with the *Gingles* requirements including the requirement of geographic compactness as applied to proposed districts. Sometimes the requirement of geographical compactness is deemed to be met[23] and sometimes it is not.[24] Similarly, in connection with Section 5, the Department of Justice considers "[t]he extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries." 28 C.F.R. § 51.59(f) (1995); *see also* Timothy G. O'Rourke, Shaw v. Reno: *The Shape Of Things To Come*, 26 Rutgers L.J. 723, 741-43 (1995) (criticizing

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[23]*E.g., Neal v. Coleburn*, 689 F. Supp. 1426, 1435 (E.D. Va. 1988).

[24]*E.g., Bryant v. Lawrence County*, 814 F. Supp. 1346, 1349-51 (S.D. Miss. 1993); *Magnolia Bar Ass'n v. Lee*, 793 F. Supp. 1386, 1402 (S.D. Miss 1992), *aff'd*, 993 F.2d 1143 (5th Cir.), *cert. denied*, 114 S. Ct. 555 (1993); *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991, 1007 (E.D. La. 1988).

the district court's belief that traditional redistricting criteria have virtually no relevance to contemporary redistricting).

Notably, the district court in *Hays v. Louisiana*, 839 F. Supp. at 1206-09, had little trouble applying narrow tailoring to racially gerrymandered districts. The *Hays* court observed that the plan contained excessively "more segregation than is necessary to satisfy the need for a second majority-black district" and that the boundaries of the districts at issue violated "traditional districting principles to a substantially greater extent than is reasonably necessary" as evidenced by numerous alternative plans that would have done substantially less violence to traditional districting principles. These same conclusions apply to Chapter 7.

B. The District Court's Analysis Of The Remaining "Narrow Tailoring" Factors Was Flawed.

In concluding that Chapter 7 was narrowly tailored to achieve the compelling state interest of compliance with Sections 2 and 5 of the Voting Rights Act, the district court also examined: (1) whether the General Assembly considered using race-neutral means to achieve the compelling state interest; (2) whether the General Assembly imposed a rigid "quota" or a flexible "goal"; and (3) whether Chapter 7 was "temporary." *See Shaw*, 861 F. Supp. at 475. The district court incorrectly analyzed these factors as well.

As for consideration of race-neutral alternatives, the Court in *Croson* discussed narrow tailoring and noted that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." *Croson*, 488 U.S. at 507. As in *Croson*, before enacting Chapter 7, North Carolina failed to consider

whether anything short of the bizarre First and Twelfth Districts might suffice to provide African Americans an equal opportunity to elect two African Americans to Congress.

Notably, in defending Chapter 601, North Carolina vociferously argued that if the Voting Rights Act required two districts in which African Americans had an equal opportunity to elect an African American, then the First and Fourth Districts in Chapter 601 met that requirement. J.A. 123-30. The Fourth District in Chapter 601 (unlike the First District in Chapter 601) did not contain a majority of African Americans, and is nowhere near as ludicrously shaped as Chapter 7's Twelfth District. *See* J.A. 543 (map of Chapter 601). Nevertheless, North Carolina offered "substantial and compelling" evidence in support of its position that African Americans in the Fourth District had an equal opportunity to elect candidates of their choice. J.A. 126. This evidence consisted of demonstrable success by African-American candidates in state, local, and other elections in the Fourth District. This evidence demonstrated that white voters, in Chapter 601's Fourth District, had not voted in bloc to defeat candidates supported by African Americans. *See id.* The State's memorandum in support of Chapter 601 demonstrates that the General Assembly knew how to examine and analyze race-neutral alternatives in drawing districts in which African Americans had an equal opportunity to elect candidates of their choice, but did not use them in Chapter 7.

As for whether the North Carolina plan constituted a flexible "goal" or an impermissible "quota," Senator Winner stated that the Department of Justice's position in rejecting Chapter 601 imposed a quota derived from the proportion of African Americans in North Carolina's general population. J.A. 201. No other credible evidence explains why the State adopted

two majority-African-American districts, instead of one or three.[25]

Moreover, the district court's conclusion that so long as a state's redistricting plan does not create more majority-minority districts than the percentage of minority voters in the state (*i.e.*, "proportional representation"), then the plan qualifies as a permissible "flexible goal" and not a forbidden "quota," is simply wrong. In *Croson*, the Court rejected an "arbitrary" set-aside of 30% of the dollar amount of subcontracts to MBE's. "The 30% quota [could not] in any real sense be tied to any injury suffered by anyone." *Croson*, 488 U.S. at 499.

As in *Croson*, the district court arbitrarily chose "proportional representation" as an acceptable "default" figure. The Voting Rights Act expressly disclaims, however, proportional representation as a requirement. Additionally, such a "default" figure utterly absolves the government from analyzing whether a district with some composition other than "majority-minority" might provide an African American an equal opportunity to be elected. *Cf.* J.A. 125-30 (analysis of the

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[25]In fact, Cohen stated in his memorandum to the Justice Department in support of Chapter 601 that the Democratic leadership had instructed him to draw the one majority-African-American district in Chapter 601 to ensure that "a black would be elected, which I did." J.A. 92; *see also* J.A. 144-46. This same mandate pervaded the creation of the two majority-African-American districts in Chapter 7. The district court and the State attempt to avoid this fact by arguing that African Americans in the First and Twelfth Districts merely have the right to elect candidates of their choice. This argument, however, is inconsistent with the district court's reliance on the lack of success by African-American congressional candidates as proof of a Section 2 violation. *See Shaw*, 861 F. Supp. at 485-86 (Voorhees, C.J., dissenting). Regardless of the arguments presently advanced, it is undisputed that when Chapter 7 was enacted, everyone associated with congressional redistricting expected that African Americans would vote in a bloc to elect two African Americans from the First and Twelfth Districts. *See* J.A. 195, 198 (Sen. Winner); J.A. 238 (Sen. Richardson); J.A. 519-20 (Pope Test.).

proposed Fourth District in Chapter 601); *see also Shaw*, 861 F. Supp. at 491 n.27 (Voorhees, C.J. dissenting) (refuting the majority's "flexible goal" analysis).

As for whether North Carolina's redistricting plan is "temporary," the district court held that Chapter 7 "is a remedial measure of limited duration, which will automatically expire at the end of the ten-year redistricting cycle . . . ." *Shaw*, 861 F. Supp. at 475. This conclusion is wrong.

A decade-long "remedy" is not, by definition, a limited remedy. *Cf. Reynolds v. Sims,* 377 U.S. 533, 555 (1964). In addition, the "remedy" will really last until Section 5 is repealed or reinterpreted. After all, any effort to reduce the number of majority-African-American districts will be assaulted under Section 5's effects prong as retrogressive. Accordingly, unless this Court repudiates them, the district court's limited "remedy," and the totally bizarre, race-based districts established by Chapter 7, really will exist indefinitely. *See Miller*, 864 F. Supp. at 1386.

C. More Compact Alternative Redistricting Plans Demonstrated That A More Narrowly Tailored Plan Was Possible.

At trial, appellants submitted alternative congressional redistricting plans that showed that it was possible to create two majority-minority districts in North Carolina that were far more geographically compact than those in Chapter 7. *See* J.A. 555 (map of "Shaw II" plan); Ex. 301 (map of "Shaw III" plan) (lodged with the Court). For example, two plans designated as "Shaw II" and "Shaw III" created a majority-African-American district in northeastern North Carolina and a majority-minority (i.e., African Americans plus Native Americans) district between

Mecklenburg and Cumberland Counties in south central North Carolina. *See* T.T. pp. 79-83.

Instead of the forty-three counties split by Chapter 7, only nineteen counties are split by Shaw II. The northeastern majority-African-American First District in Shaw II consists of only nineteen counties, as opposed to the twenty-eight counties used to construct the First District in Chapter 7. Thirteen whole counties are included in Shaw II's First District along with portions of six others. In contrast, nineteen of the counties in Chapter 7's First District are split, with only nine counties wholly included. *See* Ex. 301, Map 1 and 2; J.A. 63; *supra* at 13-14.

Even starker comparisons can be drawn between Chapter 7's Twelfth District and Shaw II's Third District. The Twelfth District consists of ten counties, only two of which (Guilford and Gaston) are covered by Section 5. Shaw II's Third District is comprised of only eight counties, six of which are Section 5 counties. *See* J.A. 63; Ex. 301, Maps 1, 2, and 4. Shaw II's Third District is comprised of four whole counties and portions of four other counties. In contrast, Chapter 7 is comprised of portions of ten different counties and fails to encompass even a single whole county. *See supra* at 13-14. Similar comparisons can be drawn between Chapter 7 and the Shaw III plan. *See* Ex. 301, Map 3.

Chief Judge Voorhees aptly destroyed the majority's contorted logic concerning narrow tailoring:

> The very purpose of narrow tailoring, of course, is to promote the accomplishment of the remedy at *minimum* expense to other important interests, including contiguity and compactness. Where, as here, the State completely disregards less

> offensive alternatives in favor of a redistricting plan as contorted as the one presently before us, I find it difficult to characterize such a plan as "narrowly tailored."

Shaw, 861 F. Supp. at 491 (Voorhees, C.J., dissenting).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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September 22, 1995

APPENDIX

42 U.S.C.A. § 1973 (1994)

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973c (1994)

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or

subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.